Brief of Rae & Knapp for P.E. on mo. allow

Filed May 18, 1897.

Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO and JOHN CHETWOOD, Jr., Plaintiffs in Error,

vs.

R. P. THOMAS, Defendant in Error.

(Cause No. 673, October Term, 1896.)

AND

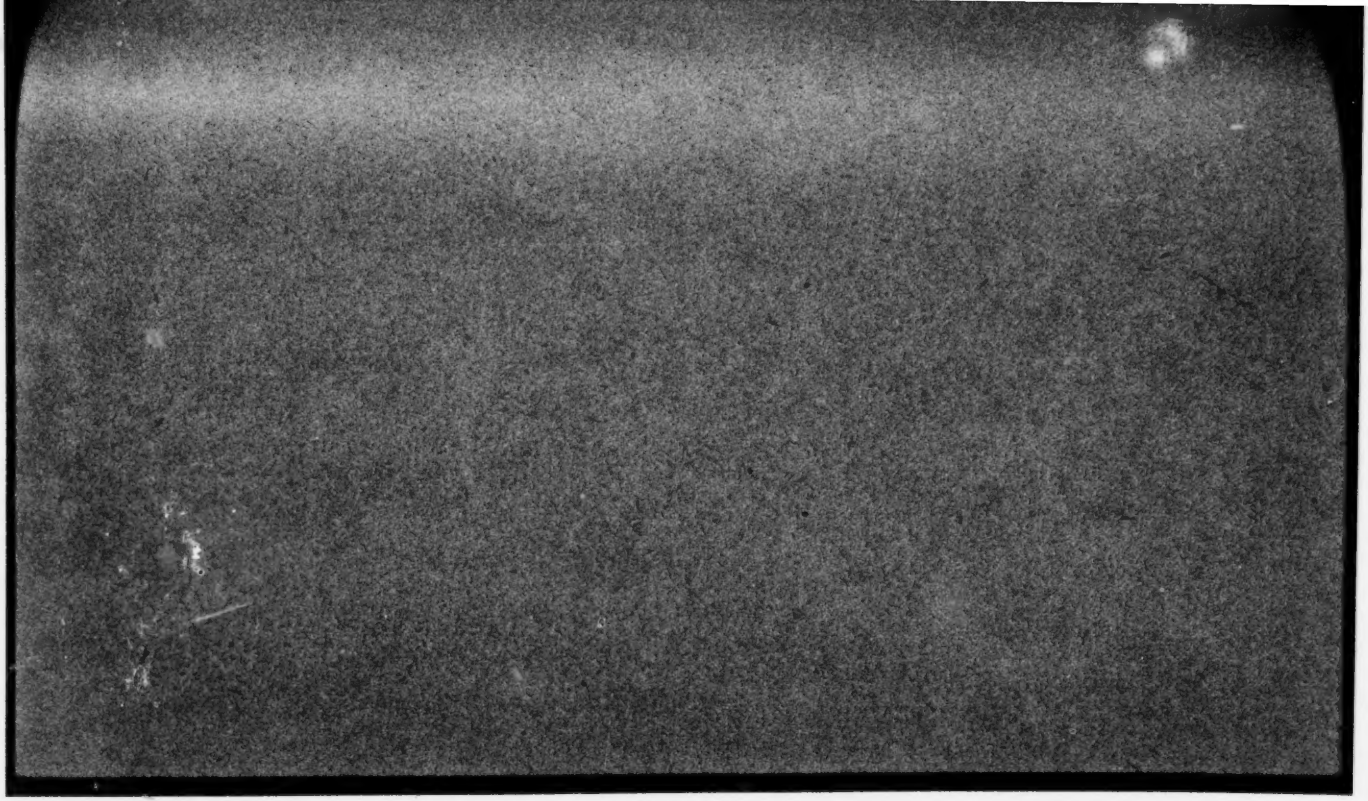
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, Jr., Representative Stockholder therein, Plaintiffs in Error,

vs.

T. K. STATELER, S. P. YOUNG, and R. P. THOMAS, Defendants in Error.

(Cause No. 674, October Term, 1896.)
In Equity.

MOTION FOR AN ALLOWANCE TO PLAINTIFFS IN ERROR FROM FUNDS IN COURT, AND PAPERS SUBMITTED IN SUPPORT OF SAID MOTION.



Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, JR., Plaintiffs in Error,

vs.

R. P. THOMAS, Defendant in Error.

(Cause No. 673, October Term, 1896.)

AND

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, JR., Representative Stockholder therein, Plaintiffs in Error,

vs.

T. K. STATELER, S. P. YOUNG, and R. P. THOMAS, Defendants in Error.

(Cause No. 674, October Term, 1896.)

In Equity.

INDEX.

	Original	Print.
Motion for an Allowance	1	1
Notice of Submission	3	2
Petition of Bank and Stockholders	4	3
Affidavit of President and Secretary to Same	24	15
Bill of Exceptions	25	16
Notice Renewing Motion in Trial Court	26	16
Order Shortening Time	30	19
Receipt for Bank Books	31	20
Motion by Plaintiff	32	20
Affidavit of R. B. Mitchell	32	21
Affidavit of J. Chetwood, Jr	37	24
Motion by Plaintiff	42	26
Certificate by the Judge	43	27
Certificate by the Clerk	44	28
Order Denying Motion	45	28
Brief of the Argument	46	29

SUPREME COURT OF THE UNITED STATES.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, JR., Plaintiffs in Error,
vs.
R. P. THOMAS, Defendant in Error.
(Cause No. 673, October Term, 1896.)
AND
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, and JOHN CHETWOOD, JR., Representative Stockholder therein, Plaintiffs in Error,
vs.
T. K. STATELER, S. P. YOUNG, and R. P. THOMAS, Defendants in Error.
(Cause No. 674, October Term, 1896.)
In Equity.

MOTION FOR AN ALLOWANCE TO PLAINTIFFS IN ERROR FROM FUNDS IN COURT.

Come now the plaintiffs in error by their counsel appearing in that behalf, and renew the motions made by plaintiff in the Superior Court of California on September 25, 1896, and denied by that Court on March 19, 1897, as appears by the bill of exceptions hereto annexed and made part hereof and marked "Exhibit A," and move this Court to make an allowance out of the funds on deposit in bank to the credit of the action pending in said Superior Court to John Chetwood, Jr., by such orders as may be proper to pay costs, disbursements, expenditures and attorney and counsel fees on account of services rendered and to be rendered by said Chetwood and solicitors, attorneys and counsel employed by him in behalf of said banking corporation plaintiff in error
2 and the stockholders thereof, on the ground that plaintiff has incurred heavy costs and liabilities on behalf of said corporation and its stockholders in this litigation for their benefit, and the said corporation by its Board of Directors and Officers have authorized and approved the action of said plaintiff, and consent to the granting of said motion and that this is a proper case for such order and allowance by this Court; on the further ground that said motion was sanctioned by the Supreme Court of California by its decision herein on August 7th, 1896, and said motion was made in

said Superior Court of said State in and for the City and County of San Francisco on September 25th, 1896, but said Court was, by injunction of the Circuit Court of the United States, Ninth Circuit, Northern District of California, prevented from hearing said motion until March 19, 1897, when the said motion having been renewed was denied by said Superior Court because of the appeals taken to this Supreme Court by writs of error allowed and served, and said trial Court considered and ruled that the power to act herein and pass upon said motions rests with this Court; and plaintiffs in error show that all parties in any way interested in said funds desire the said motion granted, and have consented to and joined in the same, as will appear by the petition of said corporation and all stockholders interested in said funds verified by the officers thereof, hereto attached and made part hereof, and the indorsements and admissions of service and stipulations hereto appended indorsed thereon.

ROBERT RAE and
E. G. KNAPP,
Counsel for Plaintiffs in Error.

3 Supreme Court of the United States.

NOTICE OF SUBMISSION.

You will please take notice that the motions of which the foregoing are true copies, with the papers submitted in support thereof, will be made and submitted to the said Supreme Court at its Courtroom in the City of Washington at the opening of Court on Monday, the 17th day of May, 1897, or as soon thereafter as counsel may be heard. Annexed are the papers submitted in support of said motion, including a brief of the argument.

ROBERT RAE and
E. G. KNAPP,
Counsel for Plaintiffs in Error.

To R. P. Thomas, T. K. Stateler and their counsel; A. H. Ricketts, R. B. Mitchell, R. A. Friedrich, W M. Pierson, and to R. R. Thompson and R. A. Wilson.

4 Supreme Court of the United States.

THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO and JOHN CHETWOOD, JR., Plaintiffs in Error,
vs.
R. P. THOMAS and T. K. STATELER, Defendants in Error

PETITION OF THE CALIFORNIA NATIONAL BANK AND STOCKHOLDERS INTERESTED IN SAID FUNDS IN COURT.

To the Honorable, the Chief Justice, and Associate Justices of the Supreme Court of the United States:

Come now the plaintiffs in error, the California National Bank, of San Francisco, a corporation, and a National Bank, and John Chetwood, Jr., a stockholder, also a plaintiff in error, and other stockholders, owning in all 355 shares out of a total of 2,000 shares of the capital stock of said National Bank and said 355 shares being the only stock entitled to share in the distribution of the funds in Court in the cause, as will appear hereinafter, and respectfully petition payment to them of the funds in Court and for such order with reference to said funds and disposition thereof, as may be proper, and in that behalf aver and show as follows:

I.

That on the 15th day of December, 1888, the said
5 National Bank temporarily suspended business, and on the 14th day of January, 1889, the Comptroller of the Currency of the United States appointed S. P. Young a receiver to take charge of its affairs under the Act of Congress entitled "An Act Authorizing the Appointment of "Receivers of National Banks and for other purposes, "approved June 30th, 1876," and the other Acts of Congress under and by virtue of which the said corporation was incorporated and organized.

That at that time the stock of said corporation consisted of two thousand shares, of which the defendant in error, R. P. Thomas, owned and still owns 1,020 shares, the defendant, R. R. Thompson, owned and still owns 555 shares, and defendant, R. A. Wilson, owned and still owns 70 shares; and the remaining 355 shares were and are owned and evidenced by certificates therefor as follows:

6

No. of Cert.	Favor of.	No. of Shares.	Then and now owned by.
1	M. R. Morgan	50	M. R. Morgan
5	John Chetwood, Jr.	20	John Chetwood, Jr.
6	J. A. Drinkhouse	10	J. A. Drinkhouse
7	R. E. Raimond	10	Executors of said Raimond's will
9	Thos. McDonald	50	Thos. McDonald
10	Chas. Heintzen	25	Chas. Heintzen
18	W. K. Vanderslice	10	W. K. Vanderslice
23	Geo. E. Whitney	50	His widow, Mary L. Whitney
25	Geo. Niggle	100	Geo. Niggle
28	Chas. A. Parsons	10	Chas. H. Holt
41	A. B. Blakeslee	12	Wm. Noyes
42	E. W. Noyes	8	Wm. Noyes
		355	

II.

That on July 19th, 1890, plaintiff, John Chetwood, Jr., brought this action in equity in the Superior Court of California on behalf of himself and the remaining owners of said 355 shares of stock, and in the name of the said corporation against the said defendants, Thomas, Thompson and Wilson, owners of the remaining 1645 shares, and prosecuted said suit at his own cost and against the opposition of said receiver and without aid from him or said corporation till September 24th, 1894, on which date said defendant, R. R. Thompson, paid into said Court the sum of $20,000.00, and said R. A. Wilson paid in the sum of $7,500.00 on
7 account of the total loss caused by the acts and omissions of defendants as trustees of said National Bank, and, further, said Thompson and Wilson then and there agreed to and with said Chetwood that neither they, said R. R. Thompson nor said R. A. Wilson, nor their said 625 shares of stock in said National Bank should or would share or seek to share in the distribution of said fund of $27,500.00, or any part thereof, but that the same should belong and be paid to the remaining shareholders or to such of them as might be entitled to share therein, to wit, to the owners of said minority of 365 shares, in proportion to the number of shares owned by each, and as securtiy that said agreement should be kept, and they and their 625 shares of stock excluded from any

share in said fund; the certificates representing said 625 shares of stock were delivered over to and placed under the control of said plaintiff, John Chetwood, Jr., and said action was thereupon discontinued and dismissed as against said Thompson and Wilson, and plaintiff agreed that he would not prosecute the said action farther as against them.

III.

That said suit proceeded against said R. P. Thomas, defendant, and later, on November 20th, 1894, said Superior Court decided, ordered and adjudged that said payment of $27,500.00 was only a partial payment, and was not a satisfaction of the claims of said corporation and its stockholders against defendants, and was not a full payment, but was on account merely of the said total loss, and debt due from defendants for and by reason of their breaches of trust, and that
8 there remained and was still unpaid the sum of $139,-419, due as a debt caused by said losses, and by the acts and omissions of said R. P. Thomas, and still unpaid and due and owing from defendant, R. P. Thomas, to said corporation, said National Bank, and entered judgment for said sum, and unpaid balance of indebtedness $139,419.00 in favor of plaintiff, but for the use of said bank and against said remaining defendant, who had not accounted for his acts and had paid no portion of said indebtedness, to wit, against defendant in error, R. P. Thomas, which said judgment for $139,419.00 was recorded on November 21st, 1894, and thereupon plaintiff asked of said Court and received an allowance on account of costs incurred and paid by him, including counsel fees for services rendered up to that time amounting to $9,500.10.

IV.

That prior to said time, to wit, on the 18th day of January, 1890, the Comptroller of the Currency of the United States had levied an assessment of $75,000.00 upon the capital stock of said corporation, said national bank, and all the stockholders therein had paid the same in full except said Thomas, who had paid in only $22,895.73 of the total $38,250.00 due from him and levied upon and against his said 1,020 shares of stock, leaving $15,354.27 unpaid and delinquent; but notwithstand-

ing said delinquency the said Thomas had, on July 6th, 1894, claiming to act under authority of the Act of Congress entitled "An Act to amend an Act entitled 'An Act authoriz-
" 'ing the appointment of receivers of national banks, and for
" 'other purposes, approved June 30th, 1876,' approved
9 " August 3rd, 1892," caused one T. K. Stateler to be elected nominally and in form the agent of these stockholders of said corporation under said act of Congress, and at said meeting and election of July 16th, 1894, no shares of stock were voted for said Stateler, or at all, save the said 1,020 delinquent shares on which said assessment was on that day unpaid as aforesaid.

That said corporation has never been dissolved by decree of any Court, nor have two thirds of the capital stock, or the owners thereof, ever voted to dissolve the said bank.

But on February 26th, 1895, the said receiver, S. P. Young, and the said Comptroller of the Currency, in form, assigned to said T. K. Stateler all assets of said bank in their hands or under their control, and did deliver to him funds of said bank aggregating $10,000.00 and upwards, as petitioners are informed and believed, and other property of much greater value, being all the assets of said bank save and except the aforesaid judgment against said Thomas, and said funds so in Court as aforesaid.

V.

That said R. P. Thomas was in November and December, 1894, and ever since has been and still is, a wealthy man perfectly solvent and able to pay said judgment, but immediately upon the judgment being entered he concealed all his property and transferred the same to various parties without consideration and in secret trust for himself, and on or about December 10th 1894, filed in Court his voluntary petition in insolvency, and obtained an order thereon adjudging
10 him an insolvent debtor, and later, to wit, on July 17th, 1895, he appealed from the said judgment of November 20th, 1894, to the Supreme Court of California, and claimed, set up, and asserted in and on and by said appeal that by the said payment of said sum of $27,500.44 into Court and the dismissal of the said action as against his co-defendants he, said Thomas, was wholly freed and released from any and all claims of said corporation set up and asserted in said suit.

That at the same time, while so seeking both to evade and reverse said judgment, and while so claiming the benefit of the said payment so made by his co-defendants, said Thomas caused said T. K. Stateler to appear in this said action on March 19th, 1895, and to claim that the said funds so paid into Court were surplus funds of the said national bank, to be distributed under and by virtue of the aforesaid Act of Congress in repayment of the said assessment, so as aforesaid levied and paid, and to move said Court on that day that said funds be paid over to him, said T. K. Stateler, for that purpose, and said motion being denied on July 8th, 1895, said T. K. Stateler took an appeal on August 14th, 1895, from said order to the Supreme Court of said State.

VI.

That after said Thomas had so filed his petition to be declared an insolvent debtor, and on or about the day of February, A. D. 1895, said Superior Court allowed and paid said plaintiff the sum of $1,000.00 from said funds, to be used in protecting and enforcing the collection of said judgment against said Thomas and uncovering his property and subjecting the same to the said judgment for the benefit
11 of said bank and in preventing his escaping the same by the aforesaid measures, and required said plaintiff to account therefor, and thereafter plaintiff took active measures to protect and enforce and collect said judgment for the benefit of said bank and its stockholders in the Supreme Court of California, and in the said Court where the said insolvent matter was pending and in other Courts, and succeeded in uncovering and subjecting to the claims of said bank large amounts of property, real and personal, belonging to said Thomas, and having expended said money, filed his account thereof, and said T. K. Stateler, in the interest and at the instance of R. P. Thomas, opposed plaintiff's said efforts by every possible means in his power, and, furthermore, began and took various and sundry steps, actions, and proceedings for the purpose of aiding said Thomas in his efforts to get rid of said judgment without paying the same or any part thereof, and of preventing the enforcement of said judgment and harassing and oppressing this corporation and its officers and said plaintiff and those interested with him in their efforts to compel said Thomas

to account for his acts as President and trustee and to enforce his liability for breaches of said trust, and, amongst others, said Stateler took the following measures all with the intent aforesaid and at the instance and in the interest of said Thomas, to wit:

VII.

The said Stateler, claiming to be a creditor of said Thomas, and for purposes of delay merely, appealed, on the 18th day of March, 1895, from the order adjudging said Thomas
12 insolvent, which said order was affirmed when said appeal was heard.

On the 18th day of April, 1895, he sued out a writ of *certiorari* in the Supreme Court of California to annul an order made in said insolvency proceedings subjecting the homestead of said Thomas to the claims of said bank and to said judgment, which said order was granted because of the pendency of the appeal last aforesaid.

On or about the 15th day of December, 1895, he filed a petition for a writ of *certiorari* to annul the orders making aforesaid allowance to plaintiff, and later brought an action against plaintiff in the United States Circuit Court, Ninth Circuit, for the said allowance of $9,000.00, and on January 4th, 1895, filed his bill in the said Circuit Court, Northern District of California, against said Chetwood and said bank, its directors, officers, and stockholders to prevent any action by said corporation or its officers, as such or at all, and therein, on February 4th, 1896, obtained an injunction and restraining order in words and figures as follows:

13 " In the Circuit Court of the United States, Ninth Cir-
" cuit, Northern District of California.

THOMAS K. STATELER, Complainant,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO, a National Bank, and JOHN CHETWOOD, JR., Defendants.

" An order having been heretofore duly given and made
" in the above-entitled action requiring the defendants to be
" and appear before this Court at a day and hour herein speci-
' 'fied and show cause, if any they have, why the said bank,

"its board of directors, officers, and employees, and the said "John Chetwood, Jr., his agents and servants, and each and "every of their said attorneys, solicitors, and counselors, "should not be restrained and enjoined pending the determi- "nation of this action from denying the rights of the com- "plainant to the said office of agent of said banking associa- "tion, and from denying his right as such agent to the "exclusive control of the assets of the said bank, and from "commencing any further litigation against him as such "agent, and from prosecuting and defending any such "actions theretofore brought by them or either of them
14 "against complainant as such agent touching his right "to such office and touching his exclusive right as such "agent to collect the assets of said bank, except the suit now "pending in this Court, brought by said defendants against "the complainant on the 12th day of November, 1895, and "which suit was by said order to show cause hereby exempted "from the operation of any injunction that might be there- "after granted in this action, and further, to show cause why "said bank, its board of directors, officers, and employees, "and the said Chetwood, his agents, and servants, and each "and every of their said counselors, attorneys, and solicitors, "should not be enjoined pending the determination of this "action from commencing any further suits to collect any "outstanding debts due said bank, whether the same be evi- "denced by an open account note, bill, or judgment, and par- "ticularly from attempting in any manner to collect the "judgment theretofore recovered against Richard P. Thomas, "for said bank, and from further prosecuting the suit brought "by defendants in the Superior Court of Alameda County to "place a receiver in charge of the Standard Soap Company; "and said order to show cause having been fully heard, "Messrs. Pierson & Mitchell appearing as solicitors for the "complainant and A. W. Thompson and John Chetwood, Jr., "as solicitors for the defendants, and thereafter submitted "to the Court for decision, and the Court being fully advised "in the premises—

"It is now ordered, adjudged and decreed that until the "further order of this Court, or of the Judge thereof, the "defendants, the California National Bank of San Francisco, "its directors, officers, and employees, and said John
15 "Chetwood, Jr., his agents, servants, attorneys, solicit- "ors, or any other representatives, are hereby re-

"strained and enjoined from commencing any further litiga-
"tion against the complainant, as agent of said bank, and
"from commencing any further suits to collect any outstand-
"ing debts due the bank, whether the same be evidenced by
"open accounts, bills, notes, or judgments, or otherwise, or
"from in any way whatever taking or attempting to take any
"control or possession of any of the funds or assets or prop-
"erty of the said bank, and from settling and allowing, or
"attempting to settle or allow, any attorney's charges or any
"other fees, expenses, or costs growing out of or which it
"may be claimed grew out of any past litigation in this
"matter, and from in any way disposing of or encumbering
"any of the assets, money, or property of said bank; but the
"defendants are not hereby enjoined from prosecuting or
"defending to final determination any actions in this matter
"now pending in the Supreme Court of the State of California
"or in this lower Court.

"Dated February 24, 1896.

"JAS. H. BEATTY, *Judge*."

16 VIII.

That the records in this cause on said two appeals to the Supreme Court of the said State having been filed therein, and the same having been submitted, the said Supreme Court of California, on July 22nd, 1896, decided and adjudged that the aforesaid dismissals and continuances of said action in equity as against said Thompson and Wilson were a retraxit and a renunciation of the action as against R. P. Thomas, and that said payment into Court by his co-defendants of said sum of $27,500.00 inured to the benefit of said R. P. Thomas and operated to release him, and reversed said judgment against said Thomas, made and entered November 20th and 21st, 1894, and ordered judgment entered in his favor, and later, on August 7th, 1896, said Supreme Court of California reversed the order of July 8th, 1895, denying said Stateler's motion to have said funds turned over to him, and on the ground that said litigation was at an end by virtue of its decision made July 22nd, 1896, ordered said funds delivered over to said Stateler after paying said Chetwood his costs and attorney's and counsel fees, and on September 1st, 1896, denied a petition to rehear the said last mentioned appeal before the said Court in Bank, and said decision of August 7th, 1896,

then became final in that Court; but thereafter, and within sixty days, writs of error duly issued to review in this Supreme Court of the United States the said decisions of said Supreme Court of California, which said writs have been returned to this Court and filed and docketed as the above entitled causes No. 673 and 674, October term, 1896; and the said funds having been theretofore, to wit, on September 10th, 1895, deposited in banks, bearing interest, in the following amounts: $7,639.84 in the San Francisco Savings
17 Union, $5,000.00 in the German Savings Bank, $4,000.00 in the Hibernia Savings Bank, it was ordered, on or about October 22d and 23d, 1896, that the bonds on said writs of error be approved as *supersedeas* bonds in said cause.

IX.

That prior to the taking of the said appeals to this Supreme Court of the United States by said two writs of error, to wit, on September 25th, 1896, said plaintiff, John Chetwood, Jr., moved said Superior Court that an allowance be made him for his costs and fees pursuant to the decision last aforesaid, but said application was not heard until after the allowance and service of said writs of error and the creation of said *supersedeas*, because the hearing thereof was delayed and prevented by reason of the existence of the aforesaid injunction and of contempt proceedings taken thereon in said Circuit Court of the United States at the instance of said Thomas by said Stateler, as appears by the annexed Bill of Exceptions.

That said injunction, as interpreted by the Judge of the said Circuit Court, also prevented and prohibited this corporation, plaintiff in error, and its stockholders from making any application to said Superior Court for the payment to them of said funds after the date thereof, upon the grounds herein set out or upon any ground, and permission to make any such application was refused by said Circuit Court and denied to petitioner; and thereafter, on November 19th, 1896, said Stateler sought to prevent by means of said injunction this corporation from having the said writs of error heard by this Court, and at the instance of said Thomas
18 moved said Circuit Court, in the action in which said injunction was issued, for an order commanding the plaintiffs in error to cease the prosecution of said writs of

error in the name of said bank in this Court and to dismiss said second writ, which order was on that day made, and obliged plaintiff herein to obtain the extraordinary writ of *certiorari* from this Court to procure a reversal of said order and cause the same to be vacated and set aside, which writ of *certiorari* was allowed and granted by this Court February 15th, 1897.

X.

That on said November 19th, 1896, plaintiff and his counsel were convicted of contempt by said Circuit Court for action taken in said matter, and said orders adjudging them guilty of contempt remained in force until set aside, as above recited, by order of this Court in *Ex parte* Chetwood, No. 7, Original, October Term, 1896, decided February 15th, 1897, and plaintiff and his counsel were unable to renew said motion for costs and counsel fees until March 19th, 1897, when the said motion of plaintiff for allowance, being renewed, coming on regularly to be heard, it was then and there denied by said Superior Court, and denied, as appears by said said Bill of Exceptions, solely upon the ground of want of power to hear the same because of said writs of error, citations thereon, bonds and *supersedeas* created thereby; and further, said Court refused to allow plaintiff costs of the proceedings in this Court for the reason that said proceedings and writs of error are, in the opinion of the Judge of said Superior Court, now presiding in Department 3, where said suit in equity is pending, ill-advised, and the said decisions herein made by the Supreme Court of the State of Cali-
19 fornia, in the opinion of said Honorable Judge of said Superior Court should and would be affirmed by this Court, as more fully appears from the annexed Bill of Exceptions hereinbefore referred to and made part hereof and marked "Exhibit A."

XI.

Said petitioners therefore further, in this behalf, aver that on the 26th day of September, 1895, at a regular meeting of the board of directors of said national bank, the President, W. K. Vanderslice, was by resolution authorized and directed to take such action as he saw fit in this litigation, and

the said President and the Vice-President, C. H. Holt, have both sanctioned and approved all the foregoing acts of said John Chetwood, Jr., and particularly the suing out of said two writs of error, and have on behalf of said corporation employed said Chetwood and his solicitor, E. G. Knapp, and counsel Robert Rae. Esq., to represent said corporation in this Court, but all the assets of said corporation being in the hands of said Stateler, said corporation has been and is unable to pay any costs or fees to its said attorneys and counsel until this Court make allowance to plaintiffs in error for that purpose.

XII.

Petitioners further aver that the said owners of said minority of 355 shares of the capital stock of said bank are the only persons interested in the funds now in the hands of the Court to the credit of this cause, as aforesaid, and that whether the said Thomas was or was not released by the said payment into Court and dismissal of his co-defendants, the said Thomas ought not to have or receive any part or share in the distribution of said funds, since the said dismissal of his co-defendants, made upon receipt and in consideration of the payment of said $27,000.00, was coupled with the aforesaid agreement that the said parties so released should not share as stockholders in the distribution of said funds, by which all parties then and thereby released are in equity bound; and further, that if said Thomas was not released thereby, then is said litigation not at an end, and said funds are applicable to payment of the costs of this litigation first, and thereafter to the payment of the claims of said corporation and of said minority against said Thomas for said losses caused by breaches of his trust as an officer of said bank, evidence by said judgment recorded against him as aforesaid. That said Stateler has no power as agent of said bank or of the stockholders to distribute said funds in accordance with said agreement or the rules and principles of Courts of Equity, but must follow the statutes under which he claims his election, which gives him custody of no funds save those that belong to all stockholders alike and requires him to distribute such surplus funds in a certain way only, to wit, in "repaying any amount or amounts which have been "paid by any shareholder or shareholders of such association

"upon and by reason of any or all assessments made upon "the stock of such association by the order of the Comptroller "of the Currency in accordance with the provisions of the "statutes of the United States"; and that the distribution under said statute of the funds on deposit in this cause would give a large part of the said funds in Court in this cause to said Thomas, contrary to said agreement and contrary to the rules and principles of Courts of Equity, and in disregard and violation of the rights of petitioners therein.

21 XIII.

Petitioners further aver that said national bank, by act of its directors and the owners of all of said 355 shares of stock have each and all sanctioned and approved all the acts of said Chetwood aforesaid and all his proceedings, and the owners of 280 of said shares have, for the purpose of aiding this plaintiff in prosecuting said litigation, assigned and delivered the said 280 shares and the certificates representing the same to B. Noyes, the Secretary of said bank, and given him power and authority to take such action as he deem best, and to apply to paying costs of said litigation such portion of the said funds as he deem necessary, and the said B. Noyes, Secretary of said corporation, and holding said 280 shares as assignee and trustee of said owners for the purposes of this litigation, joins in this petition, and in that behalf avers that it is in his opinion necessary to the proper conduct and prosecution of this litigation against said Thomas and said Stateler and for the protection of the rights of said owners of said 355 shares of stock that said funds on deposit in this cause be placed at the disposal of this corporation, and that said plaintiff, John Chetwood, Jr., be authorized to draw therefrom such sums, from time to time, as are required to pay his costs as the agent and attorney and representative of said national bank and of said holders of said 355 shares of stock in this litigation, and particularly costs and counsel fees in this Court on aforesaid writs of error in defense of the action of the trial Court and its jurisdiction and power over the said fund and the right of the said corporation and of the said owners of said 355 shares in and to the same and to the whole thereof.

That the facts hereinbefore recited, showing said minority owners of 355 shares to be the only shareholders interested

in said funds, appear in the record and returns to said writs of error.

Wherefore, petitioners pray that the bank books representing said sums of $5,000.00, $4,000.00 and $7,689.34 be delivered to said plaintiff, John Chetwood, Jr., as the chosen
22 agent of this corporation in this litigation and of its said stockholders, and that said plaintiff be authorized to draw from the funds in said savings banks such sums as the officers, to wit, the directors, President and Secretary of this corporation, deem proper and necessary for the prosecution of this litigation solely, and abide the further order of this Court as to the disposition of the balance of said money, and for such other and further order as to the Court may seem meet and agreeable to equity.

E. G. KNAPP,
Solicitor and Attorney,
and
ROBERT RAE,
Counsel for said Petitioners.

23 We hereby admit service of the foregoing petition.
MASTICK, BELCHER & MASTICK,
Attorneys for R. A. Wilson,
Formerly a Defendant herein.

24

State of California,
City and County of San Francisco, ss:—

W. K. Vanderslice and Bartholomew Noyes, being duly sworn, deposes and says, each for himself and not one for the other, that said W. K. Vanderslice is the President and B. Noyes is the Secretary of the said California National Bank of San Francisco, plaintiffs in error in the above entitled action; that he has read the foregoing petition to the Supreme Court of the United States, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters he believes it to be true.

W. K. VANDERSLICE.
BARTHOLOMEW NOYES.

Subscribed and sworn to before me, this 12th day of April, 1897.

N. E. W. SMITH,
[Seal.] *Notary Public in and for said City and County of San Francisco.*

EXHIBIT "A."

BILL OF EXCEPTIONS.

25 Be it remembered that on Friday, March 19th, 1897, in the Superior Court of the State of California, in the case of

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK, and R. P. THOMAS et al., Defendants.
T. K. STATELER (Intervenor)
} No. 30,052. Dept. 3.

in open Court—present.

Hon. Geo. H. Bahrs, Judge, and officers of the Court, counsel appearing as follows: For plaintiff, E. G. Knapp; for T. K. Stateler, Pierson & Mitchell and R. A. Friedrich, Esq., and for R. P. Thomas. Pierson & Mitchell; and the following proceedings were had:

Plaintiff read the following notice of motion, which, though noticed for March 12th, had been regularly continued till this day:

In the Superior Court of the State of California, in and for the City and County of San Francisco.

26

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FNANCISCO et al., Defendants.
} No. Dept. 3.

To R. P. Thomas and T. K. Stateler, and their attorneys herein:

Take notice that on Friday, March 12th, 1897, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, we shall renew the motion, notice of which heretofore served on you was entitled in this cause and read as follows:

"To T. K. Stateler, claiming to be the agent of the stock-
"holders of defendant bank, and Pierson & Mitchell and
"R. A. Friedrich, his attorneys.

"You will please take notice that on Friday, the 25th day
"of September, 1896, at ten o'clock a. m., or as soon thereafter
"as the matter may be heard, John Chetwood, Jr., will move
"this Court, in Department Three thereof, to make an allow-
"ance, out of the funds on deposit in said Court to the credit
"of the above entitled action, to said John Chetwood, Jr.,
"for his costs, disbursements, expenditures, and for attorney
"and counsel fees on account of services rendered and to be
"rendered by said Chetwood and attorneys employed
27 "by him in behalf of defendant banking corporation
"and the stockholders thereof.

"This motion will be made upon the records and papers on
"on file in this action and upon such oral testimony as may
"be introduced upon the hearing of this motion, and upon
"the grounds that said motion is a fit and proper one and
"that the time is now meet and ripe for the same.

"THOMPSON & THOMPSON,
"REDDY, CAMPBELL & METSON,
"E. G. KNAPP,
"*Attorneys for Plaintiff.*

"September 19th, 1896."

And on said day, or later, as aforesaid, plaintiff will, at the courtroom of said Superior Court, Department 3, in the New City Hall, in this city and county, move said Court for such allowance and payment to him out of the funds on deposit to the credit of this cause, and subject to the order of said Superior Court.

This motion will be based on this notice, the records and files of this Court and such evidence, oral or written, as may be given at the hearing, and will be made on the grounds stated above and the further grounds:

I.

That plaintiff was, until February 15th, 1897, by the injunction and orders of the Honorable Circuit Court of the United States, issued at the instance of said Stateler, prevented from making said motion in this cause, or at all.

28 II.

That on November 19th, 1896, plaintiff and his counsel, E. G. Knapp, were, on motion of Messrs. Mitchell, Pierson & Friedrich, on behalf of said Stateler, adjudged guilty of contempt by said Circuit Court for noticing said motion and for other steps taken in this cause, and thereby put to great pains, labor and expense.

That by reason of said orders of said Circuit Court plaintiff and his said counsel were obliged to and did apply to the Honorable Supreme Court of the United States for a rule to show cause why said orders should not be annulled and said Circuit Court prohibited from proceeding in said matter.

That on December 7th, 1896, such rule issued, returnable January 4th, 1897, and thereafter, on January 11th, 1897, return having been made, said cause was submitted, and on February 15th, 1897, the Honorable Supreme Court of the United States decided that said Circuit Court had no power to interfere with the Courts of this State in this litigation, and made said rule absolute and awarded on petition of plaintiff herein the extraordinary writ of *certiorari* to annul said orders of November 19th, 1896.

III.

That the claims of said Stateler to the right to control this litigation in the interest of R. P. Thomas have put plaintiff and his counsel to enormous costs and labor in necessarily bringing and defending numerous proceedings in this and other Superior Courts and the Supreme Court of the State and the Circuit and Supreme Court of the United States, and

29 in the said Court last named there are now pending on writs of error two causes, Nos. 673 and 674, in which are at issue respectively the following questions:

In case No. 673 the question at issue is the liability in equity of defendant R. P. Thomas to said defendant bank for the various breaches of his trust as President thereof, and the question of his right to claim that the dismissal entered in this cause as against his co-defendants was a release of his said liability.

In case No. 674, amongst others the questions at issue are the right and power of this Court, sitting as a Court of Equity, to retain said funds until the end of this litigation,

and to administer upon the same, if necessary, in accordance with the principles and rules of equity and the law of the land.

IV.

That despite said injunction and contempt proceedings in said Circuit Court to prevent, plaintiff has docketed said writs of error to review the decisions of the Supreme Court of this State in this case in the Supreme Court of the United States, and he is advised by his counsel, Robert Rae, Esq., who lives in Chicago, Illinois, and E. G. Knapp, who resides in San Francisco, Cal., and verily believes that he will make said pleas good, and he has given security to that end and incurred a liability for heavy costs and fees in said matters.

V.

That the aforesaid proceedings are all in the interest of said corporation and its stockholders in an effort to enforce the liability of said Thomas, and in defense of said fund and the power and jurisdiction of this Court over the same and its right to hear and determine questions affecting the distribution thereof.

30 VI.

And by reason of the existence of the foregoing facts the allowance to plaintiff of funds to pay costs and fees at this time is necessary and altogether proper.

The aforesaid motion will be and is hereby renewed without prejudice to said writs of error and the questions arising thereon, and the right to have the said writs of error heard and disposed of, and the plaintiff does not waive but insists upon the right to have the said matters heard and determined by the said Honorable Supreme Court of the United States, and makes this motion now in this Court in accordance with what he is advised are the requirements of the rules and practice of said Supreme Court.

E. G. KNAPP,
Attorney for Plaintiff.
REDDY, CAMPBELL & METSON,
Of Counsel.

Dated March 9th, 1897.

Good cause appearing therefor, it is hereby ordered that the time for serving this notice be and it is shortened to two days.

GEO. H. BAHRS, *Judge.*

Service admitted 10th day of March, 1897, on R. P. Thomas and T. K. Stateler, by their attorneys.

31 Plaintiff read also the following receipt:

"San Francisco, California, Sept. 18, 1895.

Received of John Chetwood, Jr., and R. B. Mitchell, representing T. K. Stateler, in pursuance of the order of the Court of September 6th, 1895, in the case of John Chetwood, Jr., vs. The California National Bank of San Francisco et al., No. 30,052, Department No. 3, three pass-books, as follows, to wit:

First: The San Francisco Savings Union, ordinary deposit pass-books, issued in the name of "Superior Court, San Francisco, Dept. 3, in the case of John Chetwood, Jr., vs. The California National Bank of San Francisco et al., showing a deposit dated September 10th, 1895, for $7,639.84.

Second: The German Savings and Loan Society, ordinary deposit pass-book, in the same name, showing a deposit on the same date of $5,000.00.

Third: The Hibernia Savings and Loan Society, ordinary deposit pass-book, issued in the same name, showing a deposit on the same date of $4,000.00.

Said pass-books to be retained by me and my successor until the determination of the appeal of T. K. Stateler from the order made in the above entitled action on the 8th day of July, 1895, now pending in the Supreme Court of this State, and until the further order of the Court.

C. F. CURRY, *Clerk.*

By GEO. W. LEE, *Deputy Clerk.*

And thereupon plaintiff asked that said motion be granted, and that a portion of said funds be ordered paid to plaintiff to meet costs of the proceedings had and necessary counsel fees incurred by plaintiff in said litigation referred to in said notice.

32 Mr. R. B. Mitchell, in opposition read the following affidavit:

"In the Superior Court of the City and County of San Francisco, State of California.

No. 30,052. Dept. 3.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO (a corporation) et al., Defendants.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss.*

R. B. Mitchell, being duly sworn, deposes and says: That he is a member of the firm of Pierson & Mitchell, associated with Robert A. Friedrich, as the attorneys for T. K. Stateler, the duly elected, qualified and acting agent of the California National Bank of San Francisco, defendant herein; that on the 19th day of March, 1895, the said T. K. Stateler appeared in this action and moved to have certain moneys paid into this Court by the defendants, Robert R. Thompson and Robert A. Wilson, turned over to him, to be by him divided among the shareholders of The California National Bank of San Francisco, as provided by the statutes of the United States; that this motion was opposed by the plaintiff, John Chetwood, Jr., who claimed that he was entitled to receive this fund and use the same as attorneys' fees and Court costs incurred and to be incurred by him in this action, and in such
33 other actions as he might deem it necessary to institute to collect a judgment recovered by him in this action for the benefit of the bank against the defendant, Richard P. Thomas; that on July 8th, 1895, an order was made herein denying the motion of the said Stateler to have said fund turned over to him; that on the 14th day of August, 1895, the said Stateler appealed to the Supreme Court of the State of California from said order of July 8th, 1895; that on the 7th day of August, 1896, said order was reversed by the Supreme Court of the State of California, and this Court was directed to turn over to the said Stateler said fund, after making the plaintiff, Chetwood, a reasonable allowance for his costs, disbursements and attorney's fees in this action, as contemplated by law; that the said Chetwood had already been allowed by this Court out of said fund, which originally amounted to $27,500, the sum of $10,560.16 for attorney's fees and costs in

and connected with this action, and that the Supreme Court did not know of any allowance having been made to Chetwood for attorney's fees and costs at the time it rendered its decision, for the reason that no such allowance appeared in the record on the said Stateler's appeal; that on the 1st day of September, 1896, the plaintiff, Chetwood, filed in the Supreme Court of the State of California a petition for rehearing, and that, on the 4th day of September, 1896, the Supreme Court made its judgment and order denying a rehearing, and on the 5th day of September, 1896, the remittitur issued from the Supreme Court of the State of California to this Court and was filed herein on the 8th day of September, 1896; that on the 14th day of October, 1896, this Court duly made and rendered its judgment in favor of the said T. K. Stateler and against the plaintff, John Chetwood, Jr., for $150.00 costs.

34 Affiant further says that of the $10,560.16, so as aforesaid received by the said Chetwood for attorney's fees and costs in and connected with this action, $1,000 was delivered to him to expend in employing counsel and detectives, and paying the costs of such suits as might be necessary to collect the judgment recovered for the benefit of this corporation from the said Thomas, and he was required to account to this Court for his expenditures; that on the 22d day of July, 1896, the Supreme Court of the State of California, on the appeal from said judgment of Richard P. Thomas, reversed the judgment and ordered a judgment entered in favor of said Thomas against the plaintiff, Chetwood; that the remittitur on said judgment issued to this Court out of the Supreme Court of the State of California on August 22, 1896, was filed herein on August 28, 1896, and on the same day a judgment was entered by this Court in favor of Thomas and against Chetwood for $122.40 costs, and that said judgment is still unsatisfied or discharged; that on the 19th day of September, 1896, the plaintiff, Chetwood, appeared in this action and moved for an order making him a further allowance out of the fund for attorney's fees and costs; that this motion was opposed by the said Stateler; that on October 3, 1896, the said Stateler served and filed in this action a notice of motion for an order compelling Chetwood to account for the $1,000 entrusted to him as aforesaid; that both of these motions came up before this Court for hearing after various continuances on the 23d day of October, 1896, whereupon, the

attorney for the plaintiff stated in open Court that a
35 writ of error had been allowed by the Chief Justice of the State of California to the Supreme Court of the United States to review the action of the Supreme Court of the State of California in ordering this fund turned over to Stateler; and thereupon claimed that said writ of error operated as a supersedeas and that no further proceedings could be had in reference to said fund until the Superior Court of the United States had disposed of said writ of error; that this Court, Hon. D. J. Murphy, Judge, thereupon ruled that said writ of error operated as a supersedeas, and he thereupon refused to turn over said fund, or any part thereof, to said Stateler, holding that this Court had no power to make any further orders in connection with said fund, as the matter, by virtue of said writ of error, was solely before the Supreme Court of the United States.

Affiant further says that on the 31st day of October, 1896, there was lodged in the Clerk's office of the Supreme Court of the State of California, where the record of the action of said Court on the said Stateler's appeal then remained, and within sixty days, Sundays inclusive, after gendering of the judgment complained of, a copy of the writ of error so as aforesaid allowed to review said action of said Supreme Court on Stateler's appeal, and at the same time the undertaking required by law on the hearing of the citation; that said writ of error is now pending before the Supreme Court of the United States and undisposed of, and that said undertaking is still on file in the Clerk's office of the Supreme Court of the State of California, and that, as affiant is informed and
36 believes, said writ of error is a supersedeas; that all matters sought to be reviewed therein are now before the Supreme Court of the United States, and are no longer within the jurisdiction of the Superior Court of the City and County of San Francisco, and that the matter sought to be reviewed by said writ of error is the disposition of the fund in this Court to the credit of this action, and the whole thereof.

R. B. MITCHELL.

Subscribed and sworn to before me this 11th day of March, 1897.

EUGENE W. LEVY,

[Seal.] *Notary Public in and for the City and County of San Francisco, State of California.*

37 In reply to which the plaintiff read the following affidavit:

In the Superior Court of the City and County of San Francisco, State of California.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK OF SAN FRANCISCO et al., Defendants.
No. 30052. Dept. 3.

STATE OF CALIFORNIA,
City and County of San Francisco, ss.

John Chetwood, Jr., being first duly sworn, states that he is the plaintiff herein.

That he has read the notice of motion for costs and fees filed herein March 10th, 1897, and this day read in Court, renewing the motion for an allowance out of funds in Court made herein on or about September 25th, 1896, and knows the contents thereof and the facts therein stated as the grounds of said motion.

That the same are all true of this deponent's own knowledge, save as to those facts therein stated, as on his information, or on advice and belief, and as to those he believes it to be true.

38 That replying to the affidavit of R. B. Mitchell, this day read in opposition to said motion, deponent says:

That the Supreme Court of this State, on and prior to August 7th, 1896, and before directing an allowance of costs and fees to plaintiff, did know of the orders made herein, allowing him a portion of the funds to pay his costs and counsel fees herein, not only from the briefs printed and filed by said R. B. Mitchell on said appeal and from the order of July 8th, 1895, refusing to turn the balance of said money over to T. K. Stateler, but also from the petition for writ of review filed by said counsel R. B. Mitchell, Esq., in said Supreme Court, seeking to review and annul the orders making such allowance, which petition had been denied prior to August 7th, 1895.

That on October 3d, 1896, deponent filed in this Court his sworn account of the use made of said $1,000.00 under the orders of this Court, which is still on file.

That on that day said Stateler's motion to have the funds in Court turned over to him was denied because of the writs of error and supersedeas bond thereon, but the said motion for allowance was not heard nor decided nor ruled upon, but was temporarily withdrawn by deponent solely because of the contempt proceedings then pending against deponent in the United States Circuit Court growing out of said
39 motion and the writs of error herein.

That of the $10,650.00 allowed and paid to deponent, $9,560.00 was expressly allowed by this Court for costs already incurred and paid and services rendered between July, 1890, and October, 1894, by deponent's counsel in this cause on account and because of two long and hardly fought trials of this cause, and various depositions and references in connection therewith which had resulted in a recovery and payment into Court of $27,500.00 and a judgment for $139,000.00 against R. P. Thomas in favor of the corporation defendant, and, furthermore, an agreement by the defendants, who paid the $27,500.00 that they would not participate as stockholders either in said $27,500.00 nor in the surplus funds of the bank in the hands of the receiver, nor in the first ten thousand dollars that might be thereafter recovered from the other defendant, R. P. Thomas, and thereby the interest of the bank stockholders who were entitled to share in said funds was greatly increased. And said agreement under the decision of the Supreme Court of California in reversing the judgment against Thomas, as plaintiff is informed and believes, should equitably prevent Thomas from sharing as a stockholder in said funds and thereby still further increase the interest of the stockholders entitled thereto.

That in addition to the $9,560.00 allowed as aforesaid by the honorable predecessor of this Court for costs and attorney's fees on account of services rendered between 1890 and 1894, the sum of one thousand dollars was by the late Honorable Judge of this Court placed at the disposition of plaintiff for the purpose of collecting the judgment against Thomas early in the year 1895 and more than two years ago.
40 That most of the said thousand dollars has been expended in actual and necessary costs and disbursements, and the remainder of said sum has been paid out in attorney's fees. That since the 19th day of March, 1895, it has been impossible for plaintiff to secure further allowance from this Court for any purpose whatever owing to the determined opposition of the said alleged Agent Stateler.

That plaintiff has since the said 19th day of March, 1895, been engaged in attempting to collect or protect the judgment of this Court opposed in a multitude of State and Federal Court proceedings and suits to do so by said Stateler. That so numerous and expensive have been the said suits and proceedings that plaintiff has, in addition to said thousand dollars, allowed by this Court, been compelled to advance about one thousand dollars for costs and expenses and actual disbursements alone, and has also incurred heavy liabilities to various counsel, and it is absolutely imperative for the protection of the trust herein that plaintiff be allowed a sum adequate to properly protect said trust and to properly and effectually maintain and prosecute the writs of error heretofore referred to and now pending before the Supreme Court of the United States.

That after the reversal of the judgment against Thomas by the Supreme Court of this State and the institution of said contempt proceedings against deponent and his counsel, deponent's counsel, A. W. Thompson, who had up to that time done most of the work in all this litigation, declined to act longer as counsel or attorney for deponent herein, and ceased and declined to take any further steps in this
41 matter or any part in deponent's effort to have the decisions of the Supreme Court of this State herein reviewed in the Supreme Court of the United States.

That deponent thereupon employed E. G. Knapp and Robert Rae, Esqs., to sue out and prosecute said writs of error, but he has not been able to and has not paid and is unable to pay his said counsel lately so employed any fees for their services in the said litigation or at all; and further deponent sayeth not.

JOHN CHETWOOD, JR.

Subscribed and sworn to before me this 19th day of March, 1897.

JUSTIN GATES,

[Seal.] *Notary Public in and for the City and County of San Francisco, State of California.*

42 And plaintiff thereupon moved the Court that one of the said three funds on deposit in bank to the credit of this cause be ordered placed at the disposal of the plaintiff for the purpose of enabling him to maintain and prosecute in

the Supreme Court of the United States the two writs of error referred to in the foregoing papers, numbered in said Court 673 and 674, and for the purpose of enforcing the liability of R. P. Thomas to account to said banking corporation for his breaches of trust as President, Director and member of the Executive Committee; and for the purpose of enabling him to defend the power and jurisdiction of this Court as a Court of Equity over the funds in Court recovered by the efforts of plaintiff, and preventing misappropriation or misapplication of the funds in the hands or that may come into the hands of said alleged agent, T. K. Stateler.

And plaintiff stated that he was willing to be placed under bonds in double the amount of any funds placed at his disposal to use the same in no other way than in meeting the necessary costs and expenses of such litigation. And plaintiff further stated that if such allowance be made he would not at the present time make any application for fees of his attorneys on account of services rendered since the allowance made him in October, 1894, and would only ask the allowance of such necessary expenditures as he has made.

43 The matter having been argued and submitted, the Court ruled and decided that by reason of the said writs of error, citations and bond given for costs and damages, and resulting supersedeas, that this Court had and has no power pending the decision on said writs of error to make the orders asked or any order making any allowance to plaintiff or his counsel for services hertofore rendered or costs paid or incurred.

That as to the allowance asked for the purpose of continuing the litigation, the Court was of the opinion that the suing out of said writs of error and the proceedings thereon in Supreme Court of the United States are ill advised; that the decisions of the Supreme Court of this State in this cause, reversing the judgments of his predecessors are right, and that they should be and would be affirmed by the Supreme Court of the United States.

That therefore an allowance to pay costs and fees of counsel in said Court on said writs of error would not be in defense of said fund, but would be consuming said fund, and on these grounds and for these reasons the said motions of plaintiff were and are denied.

To which rulings and decisions plaintiff then and there duly excepted, and the Court allowed the same, and hereby settles,

allows and certifies to the foregoing as a true Bill and State ment of all matters occurring at the hearing of said motion.

GEO. H. BAHRS, *Judge.*

March 26th, 1897.

The foregoing Bill of Exceptions is hereby agreed to, Marc 25th, 1897.

PIERSON & MITCHELL, and
ROBERT A. FRIEDRICH,
Attorneys for T. K. Stateler.

44 Endorsed: Filed April 10, 1897.
C. F. CURRY, *Clerk.*

. . . . . .

I, C. F. Curry, County Clerk of the City and County of Sa Francisco, State of California, and ex-officio Clerk of the Sup rior Court, in and for said city and county, hereby certify th foregoing to be a full, true and correct copy of the origin Bill of Exceptions in the above entitled cause, filed in m office on the 9th day of April, A. D. 1897.

Attest my hand and seal of said Court, this 10th day April, A. D. 1897.

C. F. CURRY, *Clerk.*
By P. W. LANNON, *Deputy Clerk.*

45 In the Superior Court of the City and County of S Francisco, State of California.

March 19th, 1897.
Present: Hon George H. Bahrs, *Judge.*

No. 30,052. Dept. 3.

JOHN CHETWOOD, JR., Plaintiff,
vs.
THE CALIFORNIA NATIONAL BANK et al., Defendants.

In this action the motion of the plaintiff for an order of t Court to make an allowance out of the funds on deposit said Court to the credit of the above entitled action for

costs, disbursements, expenditures, and for attorney and counsel fees on account of services rendered and to be rendered, came on regularly this day to be heard, Messrs. Reddy, Campbell & Metson and E. G. Knapp appeared as counsel for the plaintiff, and Messrs. Freidrich and Pierson and Mitchell for defendant, T. K. Stateler.

Thereupon the affidavit of opposing counsel was filed and read. Thereupon, after argument by respective counsel herein, and the Court being fully informed, it is ordered by the Court that said motion be and the same is hereby denied. It is further ordered that plaintiff be allowed to file an affidavit as of this day.

I hereby certify the foregoing to be a full, true and correct copy of an order made, and entered on the minutes of said Superior Court in the above-entitled Cause, on the 19th day of April, 1897, and now remaining of record in my office.

Attest, my hand and the seal of said Superior Court, this 15th day of April, 1897.

C. F. CURRY, *Clerk.*

[Seal.] By MORGAN BACKUS, *Deputy Clerk.*

---

46 BRIEF OF ARGUMENT.

In this Cause, the Supreme Court of California, in its final order, made August 7th, 1896, ordering the funds in Court paid to T. K. Stateler on the ground that the litigation is at an end, which order plaintiff seeks to review on writ of error, awarded plaintiff his costs as between attorney and client, and charges and expenses properly incurred. The exact language of the order is that plaintiff have "reasonable allow-"ance for his costs, disbursements, and attorneys' fees in "the said action, as contemplated by law" (113 Cal. Rep., 649-656).

Pursuant to this award, plaintiff, on September 25th, 1896, moved the trial Court to fix such allowance; but being met by contempt proceedings based upon an injunction of the United States Circuit Court for the Ninth Circuit, he was thereby prevented from having said motion heard till the orders adjudging him guilty of contempt were set aside by this Court, February 15th 1897 (*Ex parte* Chetwood, No. 7, Original, October term, 1896).

47 He then renewed his motion in the trial Court; but having meanwhile sued out writs of error No. 673 and 674 to review the two decisions of the Supreme Court of the State in this action, the trial Court ruled that the resulting *supersedeas* not only stayed the execution of the decree directing the funds to be turned over to Stateler, but also prevented any action in the matter of the allowance awarded plaintiff and asked for by him, and on March 19th, 1897, denied the motion for this reason (supra p. 44.)

The trial Court further ruled that no allowance should be made for proceedings in the Supreme Court of the United States, because in its opinion such proceedings, to wit, the said writs of error, are "ill-advised."

Plaintiff therefore now renews his motion in this Court, and to countervail the last mentioned ruling brings herewith a petition and affidavits showing that the corporation, and its officers, and the whole 355 shares of stock interested in the funds in Court, desired such writs sued out and desire them prosecuted and the funds in Court made available for paying costs and counsel fees thereon.

48 He shows that under the maxims, "*qui sentit commodum, sentire debet et onus*," and "equality is equity," the defendant in error Thomas can claim no share in the funds, since if he is released at all he is released by the act of his co-defendants, who, when they paid in this money, agreed that they and their stock should not share therein.

He further shows that the proceedings taken by Stateler to prevent the hearing on said writs of error were all taken at the instance of said Thomas, and that if Stateler succeeds in getting control of the fund, or any of it, Thomas will reap the benefit, and thus be the gainer by his own wrong.

That counsel now engaged in prosecuting said writs of error have not been paid, and that all parties interested, the corporation and the owners of the 355 shares of stock, in whose interests the suits are prosecuted, desire them paid out of the funds in Court and an allowance made for that purpose.

The power, we believe, rests with this Court in its discretion to make such order or direction with regard to the custody of the funds pending the litigation as will enable the corporation and the said minority to enforce its rights in

49 said funds, meanwhile protecting all parties.

Spring *vs.* S. C. Ins. Co., 6 Wheat, 519.

A Court of Equity has power to make such allowances to parties out of funds in course of administration as justice and equity require and will protect its solicitors.

Trustees *vs.* Greenough, 105 U. S., 527.
Grant *vs.* Lookout Mt. Co., 93 Tenn., 691.
Cowdrey *vs.* Galveston R. R., 93 U. S., 354.
Merwin *vs.* Richardson, 52 Conn., 225.
Ex parte Plitt, 2 Wall, Jr., 459.
Fecheimer *vs.* Baum, 43 F. R., 719.
Adams *vs.* Keppler, 38 F. R., 281.
Louisville, etc., Co. *vs.* Wilson, 138 U. S., 501.
Gavin *vs.* Norton, 38 F. R., 200.

Where a fund is realized by exertions of plaintiff, all costs as between solicitor and client will be allowed. (Daniel, Ch. Pr. 1437.) Where the costs are to be paid out of the party's own fund, the allowance will include all costs consequent upon the proceeding. (*ibid*, 1440.) In such case the broadest possible order will be made giving "costs, charges and ex-"penses properly incurred." (2 Smith Ch. Pr., 638.)

In taxing costs, a solicitor is entitled to be paid not
50 only for such proceedings as he takes necessarily, but also for proceedings which the client directs to be taken. (2 Barb. Ch. Pr., 339 (note O), citing 2 Smith Ch. Pr. 638.)

A plaintiff should be allowed from a fund costs of an appeal decided against him, where he acted as a representative of many. (Irons *vs.* Man. Nat. B., 36 F. R., 843.)

The writs of error in this cause were sued out to prevent a very plain miscarriage of justice. Motions to dismiss have been made, and if granted, plaintiff and the corporation must abide the judgment of the State Courts.

But the writs having been allowed, after an examination of the records by a Justice of this Court and by the Chief Justice of California, costs incurred, and counsel who tried the case having deserted the cause when it seemed lost, we respectfully submit that the corporation and plaintiff and the minority of 355 shares—the real parties in interest—are
51 entitled to have their costs and counsel employed by them to prosecute the writs of error paid out of the funds in Court, and that this Court will so adjudge, and will provide for the same by proper order.

The defendant Thomas, through his appointee, Stateler,

has control of funds which he is using ostensibly in the interest of the bank, but really, as the facts show, in the interest mainly of Thomas himself (p. 9, 11 and 17 orig., ante).

The corporation and its directors and plaintiff on the other side, on behalf of all parties interested, should have control of the funds obtained by plaintiff's active prosecution of this cause, not only that the liability of defendant Thomas to the bank may be enforced, if possible, and his efforts to get rid of the same thwarted, but also for the protection of the interests of the said minority in the said funds in Court in case the payment of those funds into Court had the effect of releasing the said defendant in error. Further, we submit that an allowance should be made to plaintiffs in error from
52 the funds in Court with which to meet costs as between attorney and client in this Court, as well as all costs, charges and expense of the corporation properly incurred; that the remainder of said funds should be retained subject to the disposition of the corporation under the direction of the Court having jurisdiction of this cause until the litigation is ended and the question of the liability of defendant Thomas settled by the Court of last resort, and the claims of the bank and the minority stockholders herein enforced against him.

That this Court has power to make such order by virtue of the first writ of error sued out, to wit, Cause No. 673, and that such order is under all the circumstances of the cause necessary and proper and the application properly made to this Court, by reason of the rulings of the Judge now presiding over the final Court. Respectfully submitted,

ROBERT RAE and E. G. KNAPP,
Counsel for Plaintiffs in Error.

Filed April 16th, 1897.